92-1215

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RALPH FOSTER JACKSON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause, as applied in *United States v. Tucker*, 404 U.S. 443 (1972), require a new sentencing hearing where evidence related to an unproven indictment had a "profound effect" on the sentencing court, but the defendant was subsequently acquitted of the charges set forth in that indictment?

2. Does the Due Process Clause, as applied in *Townsend v. Burke*, 334 U.S. 736 (1948), require a new sentencing hearing for a rape conviction where the sentencing judge stated that the defendant had committed a second rape, but the defendant was subsequently acquitted of those charges?

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois was filed on July 30, 1992 (App. 1-15). A Petition for Rehearing was denied by the Supreme Court (App. 16). The opinion of the Appellate Court of Illinois was filed on July 19, 1990 (App. 17-28).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The judgment appealed from was filed on July 30, 1992 by the Supreme Court of Illinois and a timely Petition for Rehearing was filed. The Supreme Court of Illinois denied that Petition on October 5, 1992, and issued its mandate on October 15, 1992.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution, § 1, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 20, 1981, following a jury trial before the Circuit Court of DuPage County, Illinois, petitioner Ralph Foster Jackson ("Jackson") was found guilty of the robbery, rape, and deviate sexual assault of Mary Margaret Winfrey on the night of December 2, 1980. Mrs. Winfrey testified at trial that a black man, whom she later identified as Jackson, had grabbed her from behind while she was attempting to lock her car in a parking lot in DuPage County, and had dragged her to a nearby stairwell where she was robbed, sexually assaulted, and raped. At trial, Jackson did not contest that Mrs. Winfrey had been raped and assaulted by a black man, but testified that he was not the perpetrator of the offenses against Mrs. Winfrey, and that she had misidentified the assailant. After deliberation, the jury accepted Mrs. Winfrey's identification and brought in verdicts of guilty on all three counts.

A sentencing hearing was held on the Winfrey convictions on May 1, 1981. Betty Knudson was called as a witness in aggravation by the State. Ms. Knudson was the complainant in an unrelated charge of rape and deviate sexual assault then pending against Jackson in DuPage County, but was permitted to testify over Jackson's objection. Ms. Knudson testified that she had been on her way to work on the evening of June 27, 1979, when she agreed to give Jackson a ride. Ms. Knudson knew Jackson because he was a neighbor and a car salesman with whom she was negotiating the purchase of a car. According to Ms. Knudson, she permitted Jackson to drive the car, and he drove to a secluded spot where he sexually assaulted and raped her. Jackson testified on his own behalf at the sentencing hearing, and categorically denied that he had raped or sexually assaulted Ms. Knudson.

At the time of the May 1, 1981 sentencing hearing, Jackson was a 29-year-old man who had never before been convicted of an offense and who (according to the sentencing judge) had an "average work record." Nevertheless, the trial court sentenced Jackson to concurrent sentences of 30 years for rape, 30 years for deviate sexual assault, and seven years for robbery. Each term was the maximum sentence permitted for the specific offense under Illinois law. In imposing the maximum sentence on this first-time offender, the trial judge stated that the "defendant committed a sexual assault and a rape on Mrs. Knudson," and concluded that "the defendant represents a serious threat to the community." Jackson filed an appeal of the Winfrey conviction, but the Illinois Appellate Court affirmed the conviction and the Supreme Court of Illinois denied Jackson's petition for leave to appeal.

Jackson continued to assert his innocence and went to trial on the Knudson charges. A jury trial held on July 13 and 14, 1981, ended in a mistrial. On April 5, 1982, on retrial, Jackson was acquitted of all charges brought by Ms. Knudson.

Pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., ch. 38, para. 112 *et seq.* (1987), Jackson filed a petition for post-conviction relief. The petition argued *inter alia* that Jackson was entitled to a new sentencing hearing under the Due Process Clause, as applied by this Court in *United States v. Tucker*, 404 U.S. 443 (1972) and *Townsend v. Burke*, 334 U.S. 736 (1948), because: (1) the sentence imposed was based on evidence of pending charges of which Jackson was subsequently acquitted; and (2) the sentencing judge stated that Jackson committed a sexual assault and rape on Ms. Knudson, though Jackson was subsequently acquitted of those charges.

At the hearing on the post-conviction petition, the same trial judge who imposed the original sentence said that if Jackson had been acquitted of the Knudson charges *before* sentencing on the Winfrey indictment, the trial court would not have admitted Ms. Knudson's testimony. The trial judge also candidly stated that there was

> no doubt that that evidence [of the pending charges] had a profound effect on what sentence he got. I would say probably no way would he have gotten the 30 years without hearing testimony from Mrs. Knudson and I will state that on the record.

Nonetheless, the petition for post-conviction relief was denied.

Jackson appealed the trial court's denial of his post-conviction petition. The Illinois Appellate Court denied

oral argument on the matter and affirmed. *People v. Jackson*, 200 Ill. App. 3d 92, 146 Ill. Dec. 100, 557 N.E.2d 1287 (2d Dist. 1990). Jackson's Petition for Leave to Appeal was granted by the Supreme Court of Illinois, which eventually affirmed with three justices specially concurring. *People v. Jackson*, 149 Ill. 2d 540, 174 Ill. Dec. 842, 599 N.E.2d 926 (1992).

ARGUMENT

A central component of the Due Process Clause is that a criminal sentence cannot be based on material misinformation or invalid assumptions about the defendant's criminal record or propensity. The Court's two seminal decisions in this area were misunderstood, and incorrectly applied, by the Supreme Court of Illinois. This fundamental error will affect sentencings throughout Illinois and, to the extent this Illinois decision is followed, sentencings in other state and federal courts.

In *United States v. Tucker*, 404 U.S. 443 (1972), this Court held that events which occurred subsequent to the imposition of sentence required a new sentencing hearing. In imposing the maximum sentence on defendant Tucker in 1953, the district court relied upon two prior felony convictions in 1938 and 1946 for which Tucker had already served time. Several years later, while serving the sentence imposed by the district court in 1953, the 1938 and 1946 felony convictions were found constitutionally invalid. Thereupon, Tucker filed a post-conviction petition under 28 U.S.C. § 2255 which was denied by the U.S. District Court, but granted by the U.S. Court of Appeals for the

Ninth Circuit, which remanded the 1953 case for resentencing without consideration of the 1938 and 1946 convictions.

This Court affirmed the Ninth Circuit's order granting Tucker a new sentencing hearing. The Court acknowledged that generally a trial judge has "wide discretion in determining what sentence to impose," but concluded that it was dealing "not with a sentence imposed in the informed discretion of the trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." *Id.* at 446-47. Therefore, the Court held that the Due Process Clause required a new sentencing hearing where the original sentence imposed was based on a previous conviction which was subsequently reversed. *Id.* at 449.

A defendant's criminal record and propensity are unquestionably the two most significant issues considered by a trial court in imposing sentence. Where there are misunderstandings or invalid assumptions about the defendant's criminal record or propensity, the Due Process Clause requires a new sentencing hearing at which the sentencing court takes into account the truth about these matters which stand at the heart of the sentencing process.

The DuPage County Circuit Court Judge, affirmed by the Appellate and Supreme Courts of Illinois, imposed the maximum sentence permissible under law on this first-time offender based on a seriously wrong and invalid assumption about Jackson's criminal record and propensity. Indeed, as the trial judge himself admitted years after the fact, (1) there was "no way" that he would have imposed the 30-year maximum sentence without Ms. Knudson's testimony related to the then-pending charges; (2) Ms. Knudson's testimony had a "profound effect" on the

sentence imposed; and (3) if Ms. Knudson's charges had resulted in an acquittal *before* the Winfrey sentencing, the trial court would not even have received Ms. Knudson's testimony. As in *Tucker*, Jackson's was "not . . . a sentence imposed in the *informed* discretion of the trial judge . . ." *Id.* at 447 (emphasis added).

Jackson does not argue that Ms. Knudson's testimony should have been excluded as a matter of constitutional law. Instead, Jackson contends that *all* of the facts related to Ms. Knudson's charges—including the salient and overwhelming fact that Jackson later stood in the dock and was acquitted—should have been taken into account by the sentencing judge under the Due Process Clause. If Ms. Knudson's allegations were considered along with the fact that Jackson was acquitted of those very charges, the sentencing judge then would have accurate and reliable information upon which to base the sentence. Without taking into account Jackson's acquittal, however, the sentencing hearing was an example of "one hand clapping." Based on the record below, it is clear that a new sentencing hearing would not be a meaningless gesture. The trial judge already has stated that there is "no way" Jackson would have received the maximum sentence if the fact of the acquittal had been known.

United States v. Tucker stands for the proposition that events affecting the defendant's criminal record which occur subsequent to a sentencing hearing require a new hearing at which the facts related to the defendant's criminal record and propensity are taken into account by the sentencing court. Jackson's subsequent acquittal of the Knudson charges presents virtually the same set of circumstances which required a new hearing in *United States v. Tucker*. For these reasons, Jackson's petition should

be granted and he should be afforded a new sentencing hearing.

The second reason for granting Jackson's petition is because the Illinois Supreme Court failed to follow *Townsend v. Burke*, 334 U.S. 736 (1948). There, a Due Process violation was found based on the trial court's sentencing of the defendant "on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* at 741. In imposing sentence, the trial court considered a charge which had been previously dismissed, and two charges on which the defendant had been found not guilty. Because the trial court's sentencing decision was based on "misinformation," and the defendant had been "prejudiced by the court's own misreading of the record," *id.* at 740, this Court held that the case presented a set of circumstances in which the prejudice to the defendant violated principles of Due Process. *Id.* at 739. The Court concluded that "[w]e are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving." *Id.* at 740.

At Jackson's sentencing hearing, the trial judge stated that Jackson had "committed a sexual assault and a rape on Mrs. Knudson." Based on the record below, the sentencing court placed great "emphasis" on Ms. Knudson's testimony in sentencing Jackson to 30 years. In effect, the trial court was sentencing Jackson for having been convicted of two rapes, when he was found guilty of one and was acquitted of another. This mistaken assumption and belief about Jackson's criminal record and propensity, as demonstrated by Jackson's subsequent acquittal on the Knudson charges, requires a new sentencing hearing under *Townsend v. Burke* at which the fact of Jackson's acquittal is taken into account.

CONCLUSION

It has been many years since this Court addressed the fundamental Due Process issues which form the basis of *United States v. Tucker* and, before it, *Townsend v. Burke*. In both *Townsend* and *Tucker*, the Court was concerned with the *accuracy* of the information which formed the basis for the sentence imposed. Accuracy is absolutely vital to a fair and informed sentence. *See Townsend*, 334 U.S. at 740; *Tucker*, 404 U.S. at 447. Without an accurate foundation, a sentencing hearing is fundamentally unfair.

The decisions of the Illinois courts in Jackson's case reveal that the judges of one of the largest of the states are not following this Court's interpretation and application of the Due Process Clause. Sentencings proceed in our state and federal courts virtually every business day of every year. Those courts must be given firm guidance by this Court about the constitutional requirement for fundamental fairness at sentencing hearings. Granting Jackson's petition herein, and reversing the decision of the Supreme Court of Illinois, will provide the direction which the lower courts require in order to insure that defendants are sentenced fairly, and in accordance with our Constitution.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Court of Illinois
Filed July 30, 1992

Docket No. 70699—Agenda 5—May 1991.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee, v. RALPH FOSTER JACKSON, Appellant.

CHIEF JUSTICE MILLER delivered the opinion of the court:

On March 20, 1981, the defendant, Jackson, was convicted in the circuit court of Du Page County of the rape (Ill. Rev. Stat. 1979, ch. 38, par. 11-1), deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 11-3), and robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18-1) of Mary W. In July 1988, Jackson filed a petition for post-conviction relief challenging several aspects of his sentencing. The trial judge denied relief, and the appellate court affirmed (200 Ill. App. 3d 92). We granted leave to appeal (134 Ill. 2d R. 315), and now affirm the decisions of the circuit and appellate courts.

Facts

The incident which led to Jackson's conviction took place on December 2, 1980, at the Fox Valley Shopping Center. Mary W. was grabbed in the parking lot and dragged down a nearby stairwell. Her assailant forced her to perform oral sex on him, then raped and robbed her. Mary W. identified Jackson as her assailant, and the jury found him guilty.

Jackson's sentencing hearing was held on May 1, 1981. The State presented as witnesses Ruth Luthringer, Jackson's former landlord, and Betty K., who claimed Jackson had raped her. Luthringer testified that she visited Jack-

son at his apartment on November 1, 1980, to collect his rent. A dispute over backrent ensued and Luthringer testified that Jackson grabbed her, started shaking her, and threw her to the floor. Jackson then jerked her up and pushed her toward the door as she was screaming for help. She went out the door and the police arrived soon after.

Betty K. testified that in June of 1979 she was Jackson's neighbor and was negotiating with him to buy a used car from the dealership where he was employed. On June 27, 1979, Betty K. was about to drive to work when Jackson asked for a ride so he could go jogging. When Betty K. stopped to let Jackson out of the car, he walked around the car to the driver's side and asked to drive. Jackson drove to a secluded spot. He then told Betty K. to take her clothes off and threatened to rip them off. She tried to run but Jackson caught her and put his arm around her throat. Jackson then forced her to perform oral sex on him and raped her. When driving back to the apartments, Jackson threatened to have her killed or cause trouble for her if she went to the police. Betty K. went home, washed, changed clothes then went to work, but did not stay. She went to the hospital and later reported the incident to the police.

Next to testify was Philip Moore, a corrections officer at the Du Page County jail. Moore testified that on January 30, 1981, while Jackson was in jail after being arrested for the rape of Mary W., Moore served on Jackson an arrest warrant and indictment for the rape and deviate sexual assault of Betty K. Moore said that when he started reading the indictment to Jackson, Jackson asked whom he had supposedly raped. Moore told Jackson that the name on the indictment was Betty K. According to Moore, Jackson replied: "I raped her, but that was a long time ago. How can they charge me with it now?"

Finally, Jackson testified on his own behalf. Jackson denied attacking Luthringer when she came to collect the rent and claimed that she stabbed him with a letter opener. Jackson also denied raping Betty K., and denied making any statement to Philip Moore about raping Betty K.

Jackson's counsel cross-examined the State's witnesses, and in summation argued for leniency while pointing out Jackson's lack of a criminal record. Counsel did not, however, present any mitigation witnesses other than Jackson himself. Jackson's parents were in the courtroom during the sentencing hearing and were available to testify. Jackson's high school principal and another acquaintance also would have been willing to testify.

At the close of the proceedings, the trial judge commented that he had no doubt that Jackson had committed the rape for which he was convicted and that Jackson had "committed a sexual assault and a rape on [Betty K.]" The judge noted that Jackson had shown no remorse and concluded that he was "a very serious threat to the community," despite his lack of a criminal record. Accordingly, the trial judge sentenced Jackson to the maximum terms of 30 years for rape, 30 years for deviate sexual assault, and seven years for robbery, the sentences to run concurrently.

Jackson was tried on the Betty K. charges in July 1981, but the proceedings ended in a mistrial because of a hung jury. Jackson was retried in April 1982 using a procedure agreed upon by counsel in which a new trial judge, Judge Black, heard no evidence, but read the transcripts of the jury trial and the previous sentencing hearing. After reviewing the transcripts without hearing witnesses, the judge concluded that the State had failed to prove Jack-

son's guilt beyond a reasonable doubt and acquitted Jackson on the Betty K. charges.

Jackson filed a petition for post-conviction relief on July 13, 1988. The petition alleged that Jackson was entitled to a new sentencing hearing on the Mary W. conviction (1) because the trial judge had taken the Betty K. charges into consideration at sentencing and he was later acquitted of those charges; and (2) because of his trial counsel's failure to present mitigation witnesses at sentencing. The separate question of whether or not the sentences were excessive was not raised in the post-conviction petition.

Judge Bowman, the same judge who presided over Jackson's trial and sentencing on the Mary W. charges, heard the petition for post-conviction relief. While hearing arguments on Jackson's petition, Judge Bowman was candid about the effect Betty K.'s testimony had on the sentence. He stated, "[There was] no doubt that that evidence had a profound effect on what sentence he [Jackson] got. I would say probably no way would he have gotten 30 years without hearing testimony from [Betty K.] and I will state that on the record." Nevertheless, Judge Bowman denied relief on defendant's post-conviction petition. The judge concluded that there was no due process violation because another judge's determination that the State did not prove Jackson guilty beyond a reasonable doubt had no effect on his determinations at sentencing where the required burden of proof is less than beyond a reasonable doubt. Judge Bowman also concluded that Jackson was not deprived of effective assistance of counsel during the sentencing hearing.

The appellate court affirmed the denial of the post-conviction petition (200 Ill. App. 3d 92). In doing so, the court expressly refused to follow the First District's ruling in

People v. Dean (1st Dist. 1987), 156 Ill. App. 3d 344, which was later reaffirmed in that district in *People v. McGee* (1st Dist. 1991), 211 Ill. App. 3d 641. This court granted Jackson's petition for leave to appeal (134 Ill. 2d R. 315).

The defendant, Jackson, argues here that he is entitled to a new sentencing hearing because he was acquitted of charges that were considered in his original sentencing hearing, and that he was denied due process because the trial judge erroneously assumed he was guilty of the Betty K. charges when he was sentenced. In addition, Jackson argues that he was deprived of effective assistance of counsel because his trial counsel failed to introduce mitigating evidence at his sentencing hearing.

The State replies that Jackson is not entitled to a new sentencing hearing and denies that the trial judge made any erroneous assumptions about Jackson's criminal record. The State also argues that Jackson was not denied effective representation because the decision not to present mitigation witnesses was a tactical decision, and that the potential mitigation witnesses, would not have made a difference in the sentence.

Discussion

We first turn to Jackson's arguments that he is entitled to a new sentencing hearing because of his acquittal on the Betty K. charges. Essentially, we are asked to decide whether due process (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2) requires resentencing after a defendant has been acquitted on charges that were considered when that defendant was sentenced for an earlier conviction.

It is clear that there are differences between the evidentiary standards required in the guilt-innocence phase

of trial and those used in sentencing. For example, in *People v. Adkins* (1968), 41 Ill. 2d 297, this court held that the rigid rules of evidence applicable during trial are not required at sentencing. In *Adkins*, the court observed:

> " 'A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.' " (*Adkins*, 41 Ill. 2d at 300, quoting *Williams v. New York* (1949), 337 U.S. 241, 247, 93 L. Ed. 1337, 1342, 69 S. Ct. 1079, 1083.)

Unlike in the guilt-innocence phase of trial, a sentencing court may:

> " 'search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and * * * the judge should know something of the life, family, occupation and record of the person about to be sentenced.' " *Adkins*, 41 Ill. 2d at 301, quoting *People v. McWilliams* (1932), 348 Ill. 333, 336.

While evidence of past criminal conduct is often not admissible at trial, it is relevant information at sentencing. Previous convictions are routinely considered. In addition, outstanding indictments or other criminal conduct for which there has been no prosecution or conviction may be considered in sentencing. Such evidence, however, should be presented by witnesses who can be confronted and cross-

examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony. *People v. La Pointe* (1981), 88 Ill. 2d 482, 498-99; *People v. Jones* (1976), 36 Ill. App. 3d 491, 494.

The discretion of trial judges in hearing evidence and determining appropriate sentences is broad, but there are limits to this discretion. This court has said that a trial court "must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials." (*Adkins*, 41 Ill. 2d at 300, citing *People v. Crews* (1967), 38 Ill. 2d 331, 337.) Additionally, while this court has not prescribed any specific traditional burden of proof at sentencing, the court has consistently stated that relevance and reliability are the important factors in the consideration of evidence at sentencing. (See, *e.g.*, *People v. Richardson* (1988), 123 Ill. 2d 322, 361; *People v. Johnson* (1986), 114 Ill. 2d 170, 205; *People v. Perez* (1985), 108 Ill. 2d 70, 88; *People v. Brisbon* (1985), 106 Ill. 2d 342, 364; see also *People v. Meeks* (1980), 81 Ill. 2d 524, 535; *La Pointe*, 88 Ill. 2d at 498; *Crews*, 38 Ill. 2d at 337.) We need not decide now if any specific traditional standard of proof applies at sentencing. Important to our analysis here is that the burden of proof at sentencing is lower than proof beyond a reasonable doubt and that evidence received be relevant and reliable. We do note, however, that the Supreme Court has held that a preponderance of the evidence standard is constitutional when a sentencing court must find a particular fact in order to trigger a minimum sentence. *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 91-92, 91 L. Ed. 2d 67, 80, 106 S. Ct. 2411, 2419.

While not dispositive of the issue presented in this case, we note that a majority of courts that have considered

the question have held that evidence of criminal conduct can be considered at sentencing even if the defendant previously had been acquitted of that conduct. (See, *e.g.*, *United States v. Coleman* (10th Cir. 1991), 947 F.2d 1424; *United States v. Dawn* (8th Cir. 1990), 897 F.2d 1444; *United States v. Mocciola* (1st Cir. 1989), 891 F.2d 13; contra *United States v. Brady* (9th Cir. 1991), 928 F.2d 844; see generally 3 W. LaFave & J. Israel, Criminal Procedure §25.1(g), at 119 (1984); Annot., 96 A.L.R.2d 768, 791 (1964 & Later Case Service).) The majority's reasoning is that an acquittal is not necessarily conclusive evidence that the defendant did not commit the acts alleged. It merely means that the government was unable to prove beyond a reasonable doubt that the defendant committed them. Therefore, there is no reason to exclude consideration of the underlying facts at sentencing where the burden of proof is lower. See *United States v. Sweig* (2d Cir. 1972), 454 F.2d 181, 184.

Furthermore, the Supreme Court has decided that evidence that resulted in a prior acquittal can be used for limited purposes in the guilt phase of trial for another offense. (*Dowling v. United States* (1990), 493 U.S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (evidence of armed robbery of which defendant was acquitted admissible for purposes of identification in subsequent bank robbery prosecution).) The Court reasoned in *Dowling* that the State is not precluded from "relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling*, 493 U.S. at 349, 107 L. Ed. 2d at 718, 710 S. Ct. at 672.

Jackson asserts that there is a difference between considering evidence of criminal conduct after there has been an acquittal and considering evidence prior to an acquit-

tal, as occurred in his case. In the former situation, he argues, the judge may look at the evidence differently since he knows that it has already resulted in an acquittal. While we recognize the difference Jackson alleges, we do not believe that the difference amounts to a denial of due process in Jackson's case. Judge Bowman may not have been aware that Jackson would ultimately be acquitted of the Betty K. charges, but he did know that Betty K.'s testimony had not yet resulted in a conviction. Moreover, there is no glaring inconsistency reflected in the record of this case. Jackson's acquittal on the Betty K. charges is still not equivalent to conclusive evidence that he did not commit the alleged conduct. The record here shows merely that in the subsequent trial, the State was not able to prove every element of its case against Jackson in a manner sufficient to meet the higher burden of proof applicable in criminal trials.

Jackson also claims that he is entitled to a new sentencing hearing under *United States v. Tucker* (1972), 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589. In *Tucker*, the defendant had been convicted of armed robbery and was sentenced to the maximum term after the court considered the defendant's three earlier felony convictions. Two of these convictions were later set aside as unconstitutional because the defendant had not been allowed the benefit of counsel. (*Tucker*, 404 U.S. at 444-45, 30 L. Ed. 2d at 594-95, 92 S. Ct. at 590.) The Court concluded that the defendant was entitled to a new sentencing hearing because he had been sentenced " 'on the basis of assumptions concerning his criminal record which were materially untrue.' " *Tucker*, 404 U.S. at 447, 30 L. Ed. 2d at 596, 92 S. Ct. at 592, quoting *Townsend v. Burke* (1948), 334 U.S. 736, 741, 92 L. Ed. 1690, 1693, 68 S. Ct. 1252, 1255.

Tucker, however, is distinguishable from this case. When Tucker was sentenced, the trial judge considered the fact that the defendant had three previous convictions. Two of those convictions were later overturned. In contrast, when Jackson was sentenced, Judge Bowman did not consider any previous convictions; he considered instead the testimony of the alleged victim of Jackson's previous criminal behavior. The witness was subject to cross-examination by Jackson's attorney and Jackson presented rebuttal testimony. The question then is whether the evidence Judge Bowman heard at the sentencing hearing must now be considered inaccurate in light of Jackson's subsequent acquittal. Similar to the cases where there was an acquittal before the charges were considered in sentencing, we again see no reason why Judge Bowman could not find that Jackson had committed the acts alleged to a certainty sufficient for sentencing, while Judge Black could find in the subsequent proceeding that the State had not proven its case beyond a reasonable doubt. Thus we cannot say that the evidence considered in sentencing was "materially untrue," as it was in *Tucker*.

Jackson next argues that he was denied due process because the trial judge sentenced him based on the assumption that he was guilty of the Betty K. charges. Citing *In re Winship* (1970), 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, Jackson argues that this assumption deprived him of due process because the trial judge's belief that he raped Betty K. is equivalent to Jackson's being convicted and sentenced on the Betty K. charges without having been found guilty beyond a reasonable doubt.

We do not believe that sentencing based in part on the Betty K. charges is equivalent to punishment before conviction. Evidence of Jackson's rape of Betty K. was merely one element of the proof of character and aggravation

of sentence for his crime against Mary W. Just as consideration of prior convictions is not resentencing a defendant for a past crime, consideration of a pending charge should not be considered premature punishment. Evidence that a defendant has repeated a crime justifies a heavier penalty for the crime on which the defendant is being sentenced, even if the defendant has not actually been convicted twice. Moreover, precluding the use of relevant and reliable evidence because no conviction was obtained would deny the sentencing authority the use of some of the most relevant evidence of a defendant's character, propensities, and likelihood of rehabilitation, evidence that is critical to the trial court's role in deciding on the most appropriate sentence for each individual offender. We understand that Jackson would be satisfied by a new sentencing hearing in which the fact of his acquittal on the Betty K. charges would be considered by the sentencing judge together with Betty K.'s testimony. Because we find no violation of due process in the original sentencing hearing, however, we do not believe a new hearing is warranted.

In sum, we hold that the consideration of the Betty K. charges in Jackson's sentencing on the Mary W. charges did not violate due process. Given our decision on that issue, the appellate court decisions in *People v. Dean* (1st Dist. 1987), 156 Ill. App. 3d 344, and *People v. McGee* (1st Dist. 1991), 211 Ill. App. 3d 641, are hereby overruled.

We next address Jackson's argument that he was denied effective assistance of counsel because his lawyer failed to present mitigation witnesses at his sentencing hearing. To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness" (*Strickland v. Washington* (1984), 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693,

104 S. Ct. 2052, 2064) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068).

We need not decide whether counsel's failure to present mitigation witnesses was unreasonable because defendant has failed to show that the witnesses would have made a difference in the sentence he received. Jackson argues that counsel should have presented his parents, his high school principal, and another acquaintance as mitigation witnesses at sentencing. Affidavits in the record show that these witnesses would have testified that Jackson had been raised in a normal family environment, had no reputation for violence, had a good reputation for honesty, and had been active in sports when he was younger.

At the time of the sentencing hearing, however, Jackson's former principal, Virgil Yates, and an acquaintance, David Phelps, had had no contact with Jackson for more than 10 years. Additionally, the testimony of Jackson's parents would most likely be viewed as biased. Finally, much of the information presented in the affidavits was contained in the presentence report and was therefore already before the judge. When Jackson was sentenced, he had just been convicted of a brutal rape. In the sentencing hearing, Judge Bowman was presented with evidence of a second rape, including threats of violence or death, and another violent incident perpetrated by Jackson against his landlord. Presented with a record such as this, we cannot say that there is a reasonable probability that Jackson's sentence would have been different had these mitigation witnesses testified.

Jackson cites *Tyler v. Kemp* (11th Cir. 1985), 755 F.2d 741, and *Dillon v. Duckworth* (7th Cir. 1984), 751 F.2d

895, as authority for the proposition that failure to call mitigating witnesses for a defendant with no criminal record constitutes ineffective assistance of counsel. We do not believe these cases apply in Jackson's situation. In *Tyler*, the defendant was convicted of the murder of her husband and sentenced to death. The defendant's trial counsel had been aditted to the bar for only a few months and failed to present any evidence in mitigation. There was evidence that the defendant's husband beat her when he was drunk, that the defendant had a good reputation as a wife and mother, and that she had a good work record and no criminal record, not even an arrest (*Tyler*, 755 F.2d at 745.) In *Dillon*, an 18-year-old defendant with no criminal record was convicted of felony murder and sentenced to death after his trial counsel's request for a continuance because of his own incompetency was arbitrarily denied by the trial judge. (*Dillon*, 751 F.2d at 898.) We do not believe Jackson's case presents the same compelling circumstances as *Tyler or Dillon*.

Conclusion

For the reasons expressed here, we conclude that the defendant, Jackson, is not entitled to a new sentencing hearing. The circumstances of his acquittal on the Betty K. charges do not indicate that the trial judge considered any improper or inaccurate facts at the sentencing hearing. Additionally, the record shows that the trial judge did not misunderstand the significance of Betty K.'s testimony or assume that Jackson had been convicted of that crime. Finally, we conclude that Jackson was not denied the effective assistance of counsel at sentencing. We therefore affirm the judgments of the circuit and appellate courts.

Affirmed.

JUSTICE CLARK, specially concurring:

I agree with the majority opinion and write separately only to point out that I believe defendant's due process rights were adequately protected by the hearing he received on his petition for post-conviction relief. Additionally, I note that today's decision should not be interpreted to prevent trial courts from granting post-conviction relief if the facts of a particular case warrant such a remedy.

Defendant's post-conviction petition sought a new sentencing hearing because the sentencing judge considered evidence of an alleged sexual attack on Betty K. for which defendant was later acquitted. It is significant to note that defendant does not argue that evidence of the attack on Betty K. was improperly admitted at his sentencing hearing. Nor does defendant contend that such evidence would be inadmissible at the new sentencing hearing which he requested. Rather, defendant asserts he is entitled to a new sentencing hearing because this evidence must be reconsidered in light of the subsequent acquittal.

Due process requires that a sentence must not be imposed based upon materially false assumptions regarding the defendant's background. While the rules of evidence for a sentencing hearing are relaxed, a court's diligence in preserving the integrity of the system must not be. Thus, when evidence is presented of alleged criminal conduct for which the defendant has not been convicted, the sentencing court must be careful not to assume that defendant was or will be convicted. If the defendant has already been acquitted for an alleged offense, that fact should be taken into account. Where, as here, there has not yet been a trial on the alleged offense the sentencing court should view the evidence in light of the presumption of innocence. In either situation, the court is free to accord substantial weight to the evidence of the

alleged criminal conduct, so long as it does not assume defendant was or will be convicted for that offense.

If a sentence is imposed based upon material facts which are subsequently proved to be untrue, due process dictates that the defendant be given the opportunity to prove that his sentence would have been different had the court been aware of the true state of affairs. In the present case, defendant was given the opportunity to make such a showing via the hearing on his post-conviction petition. At this hearing, the sentencing judge was made aware of the subsequent acquittal and considered its effect on the sentence imposed. Although the judge indicated that evidence of the attack on Betty K. was a significant factor in the sentence, he also indicated that the subsequent acquittal would not have altered his decision. Because defendant was given this opportunity to present the evidence of his acquittal to the sentencing judge, I believe defendant's due process rights were adequately protected.

Finally, I note that today's decision does not prevent a trial court from granting a new sentencing hearing under similar circumstances. If the court finds that evidence of a subsequent acquittal would have affected the sentencing decision, then I believe a new sentencing hearing would be appropriate. For example, if the sentencing judge in this case would have accorded substantially less weight to the evidence of the alleged attack on Betty K. had he known of defendant's acquittal, then I believe defendant would have been entitled to a new sentencing hearing. Further, today's decision does not prevent a new sentencing hearing when a sentencing court incorrectly assumes a defendant has been convicted of another crime, or relies on a conviction which is later reversed on constitutional grounds (*United States v. Tucker* (1972), 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589).

JUSTICES BILANDIC and FREEMAN join in this special concurrence.

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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October 5, 1992

Mr. Frederic R. Klein
Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz
55 E. Monroe St., S#3900
Chicago, IL 60603

No. 70699—People State of Illinois, appellee, v. Ralph Foster Jackson, appellant. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 15, 1992.

Opinion of the Appellate Court of Illinois
Second Judicial District
No. 2-89-0686 — Filed July 19, 1990

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

RALPH FOSTER JACKSON,

Defendant-Appellant.

Appeal from the Circuit Court of Du Page County.
Nos. 80-CF-2381, 80-CF-2382, 80-CF-2383.
Honorable John J. Bowman, Judge Presiding.

JUSTICE REINHARD delivered the opinion of the court:

Defendant, Ralph Foster Jackson, appeals from an order of the circuit court of Du Page County denying his second amended petition for post-conviction relief (Ill. Rev. Stat. 1987, ch. 38, par. 122-1 *et seq.*).

Defendant raises the following issues on appeal: (1) whether he was denied due process in his original sentencing hearing; and (2) whether he was denied effective assistance of counsel when his trial counsel failed to present certain mitigation witnesses at his sentencing hearing.

On March 20, 1981, after a jury trial, defendant was found guilty of rape (Ill. Rev. Stat. 1979, ch. 38, par. 11-1), deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 11-3), and robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18-1) of Mary W. The trial court sentenced defendant to con-

current 30-year terms of imprisonment for rape and deviate sexual assault and a concurrent seven-year term of imprisonment for robbery. This court, on October 7, 1982, affirmed the convictions and sentences in an unpublished order pursuant to Supreme Court Rule 23 (87 Ill. 2d R. 23). *People v. Jackson* (1982), 109 Ill. App. 3d 1216, 451 N.E.2d 1042.

Defendant's convictions stem from an incident on December 2, 1980, in which Mary W. was accosted at the Fox Valley Shopping Center by a muscular black man later identified as defendant. Defendant grabbed Mary W. in the parking lot near the Chicago Health Club and dragged her to a nearby stairwell where he forced her to perform oral sex upon him. Defendant then raped and robbed the victim. She sustained bruises and a swollen eye as a result of the attack.

At the May 1, 1981, sentencing hearing, as evidence in aggravation, the State presented the testimony of Ruth Luthringer who had been defendant's landlady in Oak Park, Illinois. In November 1980, Luthringer visited defendant at his apartment to collect past-due rent from him. A dispute ensued, and defendant grabbed Luthringer, shook her, and pushed her backward over the stove. After she began to scream for help, defendant placed his hand over her mouth, threw her to the floor, and started to shake her. He then "jerked" her up and shoved her toward the door. Defendant then grabbed her again, she began screaming, and, at about that time, the police arrived.

The State also presented the testimony of Betty K. who testified that, on the evening of June 27, 1979, she agreed to give defendant a ride when she was on her way to work. Defendant was a neighbor, and Betty K. had spoken

to him regarding the purchase of an automobile. At one point, Betty K. allowed defendant to drive her car. Defendant drove to a secluded location, and when Betty K. got out of the car to resume driving, defendant told her to take off her clothes. Although Betty K. tried to run away, defendant stopped her and threatened to hurt her if she did not comply. After defendant forced her to disrobe, he made her perform an act of oral sex. He then raped her on the ground, drove her home, and threatened to cause trouble for her or have her killed if she went to the police. When she got home, Betty K. bathed, changed her clothes, and went to work, but she did not stay there. She went to the hospital for an examination and reported the incident to the police.

Deputy Sheriff Philip Moore testified that on January 30, 1981, he was working at the Du Page County jail when he served defendant with an arrest warrant and indictment for the rape and deviate sexual assault of Betty K. The officer said that defendant admitted that he raped Betty K., but defendant asked how he could be charged with an offense that happened a long time ago.

In his testimony, defendant essentially denied that he had attacked Luthringer, that he had raped and sexually assaulted Betty K., or that he made any admissions to the officer. No other witnesses testified in behalf of defendant. Defendant's attorney argued that defendant was not the type of person who would commit these offenses and pointed out defendant's lack of a prior criminal record. Defense counsel then asked for leniency.

The trial court noted that it had no doubt that defendant had committed the rape for which he was found guilty, and it disbelieved defendant's version of the incident involving his landlady. The court further stated that

defendant committed a sexual assault and rape of Betty K. The court also noted that defendant exhibited no remorse and that Betty K. had no motive to lie. The trial court found that, in view of the nature of the attack on the victim in this case, Mary W., and the death threats made to her, the defendant was a very serious threat to the community. The trial court sentenced defendant to the maximum imprisonment sentences of 30 years for the sexual offenses and seven years for the robbery, to be served concurrently.

In July 1981, when defendant was subsequently tried before a jury on the Betty K. charges, a mistrial was declared due to a hung jury. In April 1982, a stipulated bench trial was held in which the trial court received evidence including the transcript of the testimony given at the jury trial held in July 1981, and a transcript of the testimony given by Betty K. at the sentencing hearing held on May 1, 1981. The bench trial resulted in an order filed April 6, 1982, finding defendant not guilty of the charges of rape and deviate sexual assault of Betty K.

On November 17, 1988, and June 22, 1989, the circuit court heard arguments in support of defendant's petition for post-conviction relief as amended. It is clear from the transcript of the post-conviction hearing that the trial judge did consider Betty K.'s testimony regarding the alleged sexual offenses committed by defendant upon her in fashioning the sentences for the Mary W. convictions, and it is clear that this testimony did affect the sentences. The trial judge also stated that he treated Betty K.'s testimony as evidence of an occurrence which had a bearing on defendant's character and his potential for rehabilitation and not as a conviction.

At the hearing on the post-conviction petition, the trial court also stated its belief that the failure of defense

counsel at the sentencing hearing to present character witnesses in mitigation, including the testimony of defendant's parents and testimony of two other witnesses that was remote in time, would not have affected the sentencing of defendant. Finding no error of constitutional dimensions, the trial court denied defendant's petition for post-conviction relief.

On appeal, defendant contends that this case should be remanded to the trial court for a new sentencing hearing because: (1) applying *People v. Dean* (1987), 156 Ill. App. 3d 344, 509 N.E.2d 618, he was denied due process when the trial court considered evidence of a pending charge for which he was subsequently acquitted; (2) the trial court premised its sentence on the mistaken belief that defendant had been convicted of the sexual offense against Betty K.; (3) the trial court denied him due process when it determined that he was guilty of the sexual offense against Betty K.; and (4) he was denied effective assistance of counsel when trial counsel failed to introduce certain mitigation witnesses at his sentencing hearing.

We turn first to defendant's contention that *People v. Dean* (1987), 156 Ill. App. 3d 344, 509 N.E.2d 618, requires remandment for a new sentencing hearing. In *Dean*, the appellate court held that in sentencing the defendant the trial court's reliance on evidence of another offense for which defendant was subsequently acquitted required remandment to the trial court for a new sentencing hearing. 156 Ill. App. 3d at 355, 509 N.E.2d at 625.

We decline to follow *Dean* for two reasons. First, *Dean* relies on several cases that do not support its holding. In *United States v. Tucker* (1972), 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589, a case cited in *Dean*, the United States Supreme Court remanded for a new sentencing

hearing because the trial court in sentencing the defendant relied on two prior *convictions* which were subsequently set aside as constitutionally infirm. The Supreme Court founded its holding in *Tucker* on the fact that the sentence was based at least "in part upon misinformation of constitutional magnitude." (404 U.S. at 447, 30 L. Ed. 2d at 596, 92 S. Ct. at 592.) In *Dean*, as in this case, the defendant was not convicted of the other offense at the time he was sentenced on the instant conviction; thus the trial court did not rely upon "misinformation." *Tucker* is further distinguishable from *Dean* and the present case because in *Tucker* the convictions of defendant were set aside based on constitutional infirmities, whereas in *Dean* and here, defendant was simply acquitted based on the evidence. Any suggestion in *Dean* that an acquittal of a defendant prior to his sentencing would preclude consideration of the evidence which led to the acquittal for purposes of sentencing is erroneous. See 3 W. LaFave and J. Israel, Criminal Procedures §25.1(g), at 119 (1984); *United States v. Morgan* (9th Cir. 1979), 595 F.2d 1134; *State v. Herzog* (1989), 112 Wash. 2d 419, 771 P.2d 739.

Dean also relies on *People v. Henderson* (1981), 95 Ill. App. 3d 291, 419 N.E.2d 1262, and *People v. Beyah* (1979), 72 Ill. App. 3d 690, 391 N.E.2d 96, to support its holding. Both of those cases are distinguishable from *Dean* and this case as they addressed the propriety of a trial court's consideration at sentencing of prior *convictions* which, unknown to the sentencing judge, were subsequently reversed. See *Henderson*, 95 Ill. App. 3d at 297, 419 N.E.2d at 1266; *Beyah*, 72 Ill. App. 3d at 697, 391 N.E. 2d at 101.

We also decline to follow *Dean* because it conflicts with the general rule in Illinois allowing a trial court in a sentencing hearing to consider evidence of other criminal con-

duct, absent a conviction thereon, provided that evidence is relevant and reliable. (*People v. La Pointe* (1981), 88 Ill. 2d 482, 498, 431 N.E.2d 344; see also *People v. Richardson* (1988), 123 Ill. 2d 322, 361-62, 528 N.E.2d 612.) While trial judges must be cautious in admitting such proof and sensitive to the possibilities of prejudice to the defendant if such information is inaccurate, it is clearly admissible under the appropriate circumstances. (*La Pointe*, 88 Ill. 2d at 499, 431 N.E.2d at 351-52.) The holding in *Dean* effectively neutralizes that general rule where such evidence provides the basis for an acquittal of defendant in a separate proceeding. *Dean* provides no support, nor can we identify any, for such a result.

Finally, we would point to the recent case of *Dowling v. United States* (1990), 493 U.S. ____, 107 L. Ed. 2d 708, 110 S. Ct. 668, as further support for our criticism of and refusal to follow *Dean*. In *Dowling*, the Supreme Court held that it does not violate the due process test of fundamental fairness to consider, in a criminal trial on the issue of a defendant's guilt, evidence of criminal conduct relating to an alleged crime that defendant has been previously acquitted of committing in a separate proceeding. (*Dowling*, 493 U.S. at ____, 107 L. Ed. 2d at 720-21, 110 S. Ct. at 674-75.) Additionally, it has been held that limitations on the admission of evidence at trial do not apply equally to a sentencing hearing as it is necessary to the intelligent disposition of a sentence that the trial court be able to utilize all relevant and accurate information. (*La Pointe*, 88 Ill. 2d at 496-98, 431 N.E.2d at 350-51.) Thus, if consideration of evidence of criminal conduct in a separate proceeding that defendant was previously acquitted of may be considered in a criminal trial, then it certainly may be considered under the less restrictive rules applicable to a sentencing hearing. We believe the

holding in *Dean* is inconsistent with this conclusion and should not be followed.

We next address defendant's contention that the trial court denied him due process by basing the sentence, in part, on its mistaken belief that defendant had been convicted of another sexual offense. Defendant argues that this case is similar to *Townsend v. Burke* (1948), 334 U.S. 736, 92 L. Ed. 2d 1690, 68 S. Ct. 1252, in that the trial court imposed its sentence, in part, on the assumption that defendant had been convicted of a separate sexual offense when in fact he had not been.

Defendant's argument is based on his characterization of the trial judge's comments at his original sentencing hearing as indicating that the trial judge believed defendant had been found guilty of the sexual assault and rape of Betty K. Defendant points to one sentence from the transcript of the sentencing hearing in which the trial judge, in discussing the various aggravating and mitigating factors, stated that "[t]he defendant committed a sexual assault and a rape on Mrs. K____."

We do not perceive the trial judge's comment, however, to reflect a belief on his part that defendant had been convicted of sexual offenses by assaulting and raping Betty K. The word "committed" is not synonymous with "convicted" and certainly can be reasonably interpreted as meaning that the trial judge found that defendant had engaged in certain conduct against Betty K. Furthermore, the trial judge also commented that "Mrs. [K.] had absolutely no motive to lie" and "there could be no misidentification with respect to Mrs. [K.]." Both of these statements, which reflect the trial judge's evaluation of the evidence as to whether defendant did in fact engage in conduct against Betty K., are inconsistent with defendant's argument that the trial judge believed defendant had already

been convicted of sexually assaulting and raping Betty K. Moreover, in considering defendant's petition for post-conviction relief, the same judge interpreted the comment relied upon by defendant in the following manner:

> "I didn't consider the evidence presented as a conviction. It was just testimony regarding an occurrence which coincidentally happened to relate to a crime and a pending charge.
>
> * * *
>
> But in this case, I didn't consider a conviction. I considered testimony from Mrs. [K.].
>
> * * *
>
> All I can tell you is: (1) I remember I relied on Mrs. [K's.] testimony. I believe that there was a sexual assault and I am using that in the generic sense, not whether or not there is proof beyond a reasonable doubt that the offense occurred, based on all of the other circumstances."

On this record, defendant's characterization of the trial judge's comment at his original sentencing hearing as reflecting the trial judge's belief that defendant had been previously convicted of sexual assault and rape is inaccurate, and his argument under *Townsend* must fail.

Defendant next maintains that he was denied due process because at his original sentencing hearing the trial court determined that he was guilty of sexually assaulting and raping Betty K., thus treating those charges as tantamount to evidence of a conviction. Such an argument is unpersuasive, however, in light of our previous interpretation of the trial court's comments regarding its assessment of Betty K.'s testimony. Further, any presentation of evidence regarding other criminal conduct allegedly engaged in by a defendant being sentenced necessarily requires a determination of whether that defendant did in

fact engage in the alleged conduct. Such a finding is not tantamount to a determination of guilt such that the sentencing court would treat such a finding as equivalent with a guilty finding for purposes of sentencing the defendant. Further, the due process clause is not offended when a trial court in a sentencing hearing considers evidence of other criminal conduct which has not resulted in a prosecution and conviction, provided that evidence is relevant and reliable. (*People v. La Pointe* (1981), 88 Ill. 2d 482, 498, 431 N.E.2d 344.) Accordingly, we find defendant's contention in this regard to be without merit.

Defendant's last contention is that he was denied effective assistance of counsel at his sentencing hearing because his attorney failed to call certain witnesses in mitigation. The State first responds that defendant's argument is waived because it was not raised in his direct appeal.

Defendant's argument in his post-conviction petition relies on affidavits of several potential mitigation witnesses. Those affidavits were not part of the record on appeal. Thus, defendant could not have raised the issue in his direct appeal, and the issue is not waived here. *Cf. People v. Caballero* (1989), 126 Ill. 2d 248, 274, 533 N.E.2d 1089.

In order to establish the ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Shum* (1987), 117 Ill. 2d 317, 369-70, 512 N.E.2d 1183.) Regarding the first element of this test, an alleged incompetency arising from a matter of tactics or strategy will not support a claim of ineffective representation. (*Shum*, 117 Ill. 2d

at 370, 512 N.E.2d at 1205.) Furthermore, the failure to offer evidence in mitigation of sentence does not, in and of itself, demonstrate incompetence (*Shum*, 117 Ill. 2d at 370, 512 N.E.2d at 1205), and a competent attorney may decide, in an appropriate case, to forego presenting mitigating evidence and, instead, plead for mercy. (See *People v. Caballero* (1989), 126 Ill. 2d 248, 274-75, 533 N.E.2d 1089.) In all cases where the drawbacks of potentially mitigating evidence are obvious from the record, we must presume that the drawbacks, and not counsel's lack of diligence, were behind counsel's decision. *Caballero*, 126 Ill. 2d at 275, 533 N.E.2d at 1098.

In the present case, defendant relies on the affidavits of his parents as well as an affidavit of his high school principal and an acquaintance, the latter two who have had no contact with defendant since defendant graduated from high school in 1970, as evidence of mitigation which his trial counsel should have introduced at his sentencing hearing. We believe that trial counsel's failure to present any of these witnesses in mitigation was a matter of trial tactics and strategy in this case. There is no suggestion in the affidavits that defendant's trial counsel did not discuss the sentencing proceedings with defendant or that counsel refused to call these witnesses. The two non-family witnesses had no contact with defendant for over 10 years. Accordingly, they would have shed no light on defendant's recent character. Furthermore, the record shows that defendant's parents had relatively infrequent personal contact with defendant over the past 10 years. Moreover, defendant's parents would not be overly persuasive mitigation witnesses as their bias towards defendant would be obvious. Most of what is stated in the parents' affidavits as to what they would have testified to is contained in the presentence report. Trial counsel

did advance evidence in mitigation at the sentencing hearing through defendant's own testimony of his denial of an altercation with his landlady and of his denial of the sexual assault of Betty K. as well as counsel's argument for leniency in sentencing because of defendant's lack of any prior criminal record and his personal background as shown in the presentence report. On this record, we do not attribute counsel's decision not to present this evidence as a lack of diligence resulting in incompetent representation.

Additionally, defendant suffered no prejudice as a result of trial counsel's failure to present these witnesses in mitigation. As noted above, defendant's parents were obviously biased toward defendant, and the other two had no contact with him for over 10 years prior to his trial. Furthermore, there was considerable evidence in aggravation showing defendant's violent tendencies, including the evidence that defendant had sexually assaulted and raped another victim recently. In light of the limited value of the now proposed mitigation evidence and the evidence that was before the court at the sentencing hearing, we cannot say that trial counsel's failure to present this mitigation evidence created a reasonable probability that, but for counsel's decision, the outcome of the sentencing hearing would have been different.

The judgment of the circuit court of Du Page County is affirmed.

Affirmed.

UNVERZAGT, P.J., and INGLIS, J., concur.